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SEQUENOM, INC.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ARIA DIAGNOSTICS, INC.

Plaintiff,

v.

SEQUENOM, INC.,

Defendant/
Counterclaim-Plaintiff,

v.

ARIA DIAGNOSTICS, INC.,

Counterclaim-Defendant,

and

ISIS INNOVATION LIMITED,

Nominal Counterclaim-
Defendant.

Case No. 3:11-cv-06391-SI

SEQUENOM'S OPPOSITION TO ARIOSA'S ADMINISTRATIVE MOTION FOR LEAVE TO FILE A SUR-REPLY MEMORANDUM IN OPPOSITION TO SEQUENOM'S MOTION FOR PRELIMINARY INJUNCTION

Date: June 29, 2012
Time: 9:00 a.m.
Place: Courtroom 10, 19th Floor
Judge: Hon. Susan Illston

Sequenom opposes Ariosa's Administrative Motion to File a Sur-Reply because Ariosa fails to present good cause for this Court to deviate from the stipulated order setting the briefing schedule for Sequenom's motion for preliminary injunction. Ariosa's administrative motion does not even mention the stipulated order that this Court entered, much less present good cause to deviate from it. The premise of Ariosa's administrative order—that it should be allowed to file a sur-reply "to address new evidence offered for the first time by Sequenom in its Reply"—flies in the face of the stipulated order and miscasts rebuttal testimony as "new evidence." Ariosa's proposed sur-reply is further argument made under the guise of addressing "new evidence," and the Court should deny Ariosa's motion for leave to file it.

Sequenom filed its motion for preliminary injunction in this Court on March 8, 2012. Dkt # 34.[1] The parties then met and conferred over Ariosa's proposal for expedited discovery and to establish a briefing schedule for the pending motion for preliminary injunction. The resulting stipulated order, which this Court entered on March 20, 2012, provided for a mutual exchange of documents, followed by (i) Ariosa's depositions of Sequenom's declarants and one additional percipient witness, (ii) Ariosa's filing of its opposition, (iii) Sequenom's depositions of Ariosa's declarants and one additional percipient witness, and (iv) Sequenom's filing of its reply. Dkt # 45. From the outset, this schedule contemplated that Sequenom would use its reply to rebut testimony and evidence proffered by Ariosa's declarants. Ariosa did not propose, and the stipulated order did not provide, for Ariosa to submit a sur-reply, let alone a sur-reply that goes far beyond addressing the rebuttal testimony of Sequenom's declarants.

With its reply, Sequenom submitted supplemental declarations from two declarants—Dr. Mark Evans and William Welch—whose initial declarations had been submitted with Sequenom's opening brief. Dr. Evans's initial declaration expressly noted that Ariosa had not at that time challenged the validity of the '540 patent, and that if "[Ariosa] offers any arguments or

[1] Sequenom first filed the pending motion for preliminary injunction in *Sequenom v. Aria*, SDCA Case No. 12-cv-0189, on February 22, 2012. After this Court denied Sequenom's motion to dismiss or transfer the present case to the Southern District on March 7, 2012 (Dkt. # 31), Sequenom refiled its motion for preliminary injunction in the present action the next day, March 8, 2012. Dkt. # 34.

evidence relating to validity, I reserve the right to respond by way of a supplemental declaration." Dkt. #35 at 1. *See also* Sequenom's Motion for Preliminary Injunction, Dkt. # 34 at 7:24-25 ("Sequenom will address any invalidity arguments if and when raised.").

Simply put, before the stipulated order was entered, it was contemplated that Dr. Evans would submit a supplemental declaration with Sequenom's reply. Dr. Evans's supplemental declaration addresses Ariosa's invalidity arguments, as well as the proposed claim constructions that Ariosa proffered for the first time in its opposition. Likewise, Mr. Welch's supplemental declaration addresses Ariosa-related events that occurred ***after*** Sequenom filed its opening motion papers, including Ariosa's partnership with Laboratory Corp. of America ("LabCorp"), which Ariosa did not publicly disclose until May 7, 2012.

Ariosa presents no argument that the rebuttal evidence presented via Dr. Evans' and Mr. Welch's declarations could have been submitted with Sequenom's opening brief, or that Ariosa was surprised by the rebuttal evidence. Moreover, Ariosa's proposed sur-reply goes far beyond addressing the rebuttal evidence. Ariosa's eight-page proposed sur-reply contains mostly argument and re-argument. *See, e.g.*, proposed sur-reply at 1:7-26 (arguing about legal interpretation of *Prometheus*), 2:7-3:16 (arguing about Evans declaration submitted with Sequenom's ***opening papers***), 6:27-7:25 (more legal argument).

In sum, Ariosa does not present good cause for deviating from the stipulated order. If the Court is inclined to allow the sur-reply, Sequenom respectfully requests that the Court likewise allow Sequenom's response to the points raised in the sur-reply, as allowed for in the court order that Ariosa attaches as Exhibit 2 to its motion: Civil Minutes, *QBAS Co. v. Chapman-Walters Intercoastal Corp.*, No. 8:10-cv-00406-AG (MLGx), Dkt. No. 42 (C.D. Cal. July 12, 2010). Sequenom's proposed response is three and a half pages and is attached hereto as Exhibit 1.

Dated: June 19, 2012

Respectfully submitted,

KAYE SCHOLER LLP

By: */s/ Peter E. Root*
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